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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. RICHARD WALTER JONES, Defendant and Appellant.	C045277 (Super. Ct. No. CM018402)

APPEAL from a judgment of the Superior Court of Butte County, Robert Glusman, Judge. Affirmed.

Alfons G. Wagner, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, Stan Cross, Supervising Deputy Attorney General, Susan J. Orton, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of part I.

An information charged defendant Richard Walter Jones with continuous sexual abuse of a child (count 1). In a negotiated disposition, the information was amended to add two counts of lewd and lascivious acts with a minor (counts 2 and 3). Count 2 was alleged to have occurred on or about November 21, 1994; count 3 was alleged to have occurred on or about November 21, 2000. Defendant pled no contest to counts 2 and 3, and count 1 was dismissed with a *Harvey*[1] waiver. In the plea form, defendant acknowledged that he could be sentenced to up to 10 years in prison.

Consistent with the plea, the trial court sentenced defendant to state prison for 10 years, consisting of the upper term of eight years on count 2 plus a consecutive term of two years (one-third the middle term) on count 3. The court ordered him to pay a $4,000 restitution fine and a $4,000 restitution fine suspended unless parole is revoked.[2]

On appeal, defendant contends: (1) imposition of the section 1202.45 fine "in relation to" count 2 is barred by the ex post facto clauses of the federal and state Constitutions; and (2) the upper term of imprisonment on count 2 was imposed in violation of his rights under the federal Constitution because the factors supporting the upper term were not found by a jury.

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[1] *People v. Harvey* (1979) 25 Cal.3d 754.

[2] Hereafter, we shall refer to the latter fine as the section 1202.45 fine, based on the section of the Penal Code under which it was authorized.

We conclude that defendant has failed to show error in the imposition of the section 1202.45 fine and that by acknowledging in his plea that he could be sentenced to up to 10 years in prison, he necessarily admitted that his conduct was sufficient to expose him to that punishment. Accordingly, we will affirm the judgment.

FACTS[3]

The victim was 14 years old when she was interviewed in October 2002. Defendant is her mother's boyfriend. Defendant started molesting the victim when she was approximately four years old. When she was eight or nine years old, he had sexual intercourse with the victim, causing her to cry. He continued to be involved sexually with the victim until she was 13 years old.

DISCUSSION

I

Ex Post Facto Fine

Defendant contends imposition of a section 1202.45 fine "in relation to" count 2 is barred by the ex post facto clauses of the federal and state Constitutions. We conclude defendant has not met his burden to show error by an adequate record.

The probation report recommended that defendant "Pay a restitution fine per § 1202.4(b) PC in the amount of $4,000.00," and that he "Pay a restitution fine, suspended per § 1202.45 PC

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[3] Because defendant pled no contest, our statement of facts is taken from the probation officer's report.

in the amount of $4,000.00." The report cautioned that the section 1202.45 fine "Applies to offenses after August 3, 1995." The trial court signed the probation report and ordered restitution fines in the amounts recommended.

A restitution fine for a felony offense "shall not be less than two hundred dollars ($200), and not more than ten thousand dollars ($10,000)." (Pen. Code, § 1202.4, subd. (b)(1).) Count 3 alleged a felony offense that occurred on or about November 21, 2000. That felony offense fully supports both $4,000 restitution fines.

Defendant speculates that the trial court disregarded the "August 3, 1995" limitation in the probation report and determined the restitution fines by relying on *both* counts 2 and 3. His argument is based on the happenstance that the formula set forth in Penal Code section 1202.4, subdivision (b)(2), yields the exact amount of his fine. Multiplying $200 by the number of years of imprisonment for both counts (10), and by the number of counts to which he pled (2), yields a product of $4,000. Defendant thus claims that by inserting count 2 into the statutory formula, the court violated the proscriptions on ex post facto laws.

Defendant's argument presumes that the trial court overlooked the probation report's cautionary statement and erroneously relied on *both* counts, even though it could have reached the same result by relying on count 3 alone. His argument is contrary to a fundamental principle of appellate review. "'[A]n order is presumed correct; all intendments are

indulged in to support it on matters as to which the record is silent, and error must be affirmatively shown.' [Citation.]" (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1046, quoting *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 321; see *In re Sade C.* (1996) 13 Cal.4th 952, 994.)

The record does not affirmatively show that the section 1202.45 restitution fine was based in part on count 2; we thus presume it was based on count 3 alone. No error appears.

II

Imposition Of Upper Term

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely v. Washington* (2004) 542 U.S. ___, ___ [159 L.Ed.2d 403, 413-414].)

Relying on *Apprendi* and *Blakely*, defendant claims the trial court erred in imposing the upper term on count 2. The contention fails.

Plea bargaining is a judicially and legislatively recognized procedure (*People v. Masloski* (2001) 25 Cal.4th 1212, 1216; Pen. Code, § 1192.5) that provides reciprocal benefits to the People and the defendant. (*People v. Orin* (1975) 13 Cal.3d 937, 942.) When, as part of a plea agreement, a defendant agrees to the maximum sentence that may be imposed, he necessarily admits that his conduct is sufficient to expose him to that punishment and reserves only the exercise of the trial court's sentencing discretion in determining whether to impose that sentence. (See *People v. Hoffard* (1995) 10 Cal.4th 1170, 1181-1182.) The decisions in *Apprendi* and *Blakely* do not preclude the exercise of discretion by a sentencing court so long as the sentence imposed is within the range to which the defendant was exposed by his admissions. Such is the case here. Defendant's plea in effect admitted the existence of facts necessary to impose the upper term on count 2.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

SIMS, Acting P.J.

NICHOLSON, J.